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U.C.C. Revised Article 9: Can Domain Names Provide Security for New Economy Businesses

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U.C.C. Revised Article 9: Can Domain Names Provide Security for New Economy Businesses?

The payoff available to entrepreneurs and private equity investors launching Internet-related start-up businesses has fallen dramatically in the last year. Many Internet-related businesses have fallen short of expectations,[1] and their stock prices have plummeted.[2] These realities create an environment in which e-businesses must consider every financing alternative[3] and creditors must take all precautions to protect their interests.[4] When considering the option of secured financing, both e-businesses and creditors seek valuable and saleable e-business assets for collateral.

Unfortunately, by their nature, Internet-related businesses have little physical collateral to provide as security for creditors; some e-businesses consist of little more than computer servers, personnel, and an idea.[5] One asset of e-businesses, however, should not be

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1. Suzanne McGee, *New Economy Sours On Venture Capitalists*, WALL ST. J., Jan. 2, 2001, at R6 (describing the reduced returns in late 2000 of many venture capital firms and the despair of many online businesses); Noshua Watson, *What Will Resuscitate the IPO Market?*, FORTUNE, Jan. 8, 2001, at 42, 42 (discussing the decline in the success of initial public offerings from the highs of 1999 and early 2000).

2. Brad Stone, *Finally, the Net Gets Real*, NEWSWEEK, Dec. 25, 2000, at 66, 66–67 (noting that the NASDAQ stock index, which includes many Internet-related companies, dropped forty-seven percent between March and December 2000 and commenting on specific Internet-related companies whose stock prices dropped more than ninety percent or who shut down entirely); Melanie Warner, *A New Way to Lose on the Internet*, FORTUNE, June 26, 2000, at 318, 318 (noting that half of the 375 Internet-related stocks traded below their initial public offering prices and that stock options granted to many employees in Internet-related companies were essentially worthless).

3. Tom Foremski, *Shaky Start-ups Bite the Dust*, FIN. TIMES, Sept. 22, 2000, at XXVIII, XXVIII (noting a decline in venture capital investments for online retailers and business-to-business start-ups); Michael J. Mandel, *The Next Downturn*, BUS. WK., Oct. 9, 2000, at 173, 174 (stating that a sustained decline in the stock market will have the effect of reducing technology entrepreneurs' access to capital); Michael J. Mandel, *Slip Sliding Away?*, BUS. WK., June 12, 2000, at 44, 44–45 (noting that the drop in initial public offerings will reduce venture capital financing); McGee, *supra* note 1 (predicting a reduction in private equity financing); Debora Vrana, *Ailing Start-Ups May Soon Lose VCs' Infusion*, L.A. TIMES, Oct. 16, 2000, at C1 (explaining that many venture capital firms have discontinued funding Internet-related start-up businesses because of the downturn in the value of publicly-traded Internet-related companies).

4. Tyler Maroney, *Credit Denied: Dot-Coms Feel the Squeeze*, FORTUNE, July 24, 2000, at 336, 336 (observing that "[a]s more and more Internet startups stumble ... companies that do business with the Net newbies are losing faith in their clients' financial stability" and are requiring letters of credit, escrow accounts, and advance payments).

5. Ben Chen, *Should You Sell Your Dot-Com?*, E-BUSINESS ADVISOR, Nov. 2000, at

overlooked: the Internet domain name. Rights to Internet domain names can be extremely valuable and, in fact, might be the cornerstone of any new Internet business.[6] If domain name rights can be used as collateral, businesses might be able to obtain additional financing and creditors might better solidify their interests.[7]

Historically, commercial law has adapted to permit businesses to utilize a wide range of intangible assets as collateral.[8] This Recent Development examines whether Revised Article 9 of the Uniform Commercial Code[9] (effective July 1, 2001)[10] follows history and is sufficiently prepared for E-businesses to use internet domain names as collateral. To address this issue, this Recent Development

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36, 38–39 (indicating that the value of troubled dot-coms comes not from physical assets but from other assets such as a customer base, technology, and a brand); Geoffrey Colvin, *Value Driven: You're Only as Good as Your Choices*, FORTUNE, June 12, 2000, at 72, 72 (noting that many dot-coms have few physical assets but might be worth a great deal).

6. *See* Chana R. Schoenberger, *A New Lease on Leasing for Most Small and Medium-Sized Businesses, Leasing Equipment Is a Way of Life. Here's a Better Way to Do It*, FORBES, July 17, 2000, at 77, 78 (noting that one entrepreneur received a $2 million loan based on his domain name alone); *see also* Ronald Grover, *Cough It Up for Dot.tv*, BUS. WK., May 1, 2000, at 12, 12 (reporting that a new company paid $50 million for the rights to sell domain names ending with ".tv"); *infra* note 16 (noting recent examples of domain names selling for high prices). Indeed, an entire marketplace for domain names has developed, with many domain name brokerages buying, selling, and trading domain names at auction. For Web sites of businesses based entirely upon the purchase and sale of domain names, see Afternic.com, *The Domain Name Exchange: Buy, Sell, Appraise, & Manage Domain Names*, *at* http://www.afternic.com.com (last visited Jan. 7, 2001) (on file with the North Carolina Law Review); GreatDomains.com, *at* http://www.greatdomains.com (last visited Jan. 7, 2001) (on file with the North Carolina Law Review). The first step in creating a new Internet-related business often is obtaining rights to a domain name. *You are Your URL*, INC., Nov. 1, 1999, at 120, 120–24 (noting examples of new companies that were forced to pay large sums of money to obtain specific domain names).

7. Because of the developed market for Internet domain names, see *supra* note 6, valuable domain names could be auctioned to recoup debt.

8. Revised Article 9, for example, has expanded to include intangible assets such as promissory notes, payment intangibles, and deposit accounts, and has been modified to permit assets such as health-care-insurance receivables and software licenses to be used effectively as collateral. Rev. U.C.C. § 9-109(a)(3) (2000) (bringing sales of promissory notes and sales payment intangibles within the scope of Revised Article 9); *id.* § 9-109(d)(13) (excluding deposit accounts as original collateral only in consumer transactions); *id.* § 9-109(d)(8) (stating that Revised Article 9 may apply to "an assignment by or to a health-care provider of a health-care-insurance receivable and any subsequent assignment of the right to payment"); *id.* § 9-408 cmt. 2 (indicating the drafters' intention to make software licenses effective collateral under Revised Article 9); *see also id.* § 9-101 cmt. 4(a) (summarizing changes in the scope of Article 9).

9. *Id.* § 9-101 to 9-709. As of January 1, 2001, a majority of states had enacted Revised Article 9, with the remainder expected to enact the Article prior to its effective date of July 1, 2001. Gerald T. McLaughlin & Neil B. Cohen, *Revised Article 9: Much Ado About Everything*, N.Y.L.J., Jan. 17, 2001, at 3.

10. Rev. U.C.C. § 9-701 (2000).

describes what domain names are, examines whether security interests in domain name rights may be created under Revised Article 9, evaluates potential limitations on secured parties using domain name rights as collateral, and discusses ways to minimize these limitations.

Most Internet users are familiar with how to use a domain name to search for information on the Internet. Domain names are usually recognizable phrases composed of numbers and letters, ending with suffixes such as ".com," ".org," ".gov," or ".net."[11] Some widely known domain names include "yahoo.com," "npr.org," and "netzero.com."[12] Each computer attached to the Internet (a "host") is assigned an Internet Protocol address ("IP address"), a series of numbers and decimals representing its address in cyberspace.[13] Internet naming services ("registrars"), such as Network Solutions, Inc. and Register.com, maintain databases linking each host's numerical IP address to an Internet domain name.[14] A person

11. The suffixes referred to here are called "top-level domains": ".com," ".org," and ".gov." *See* Kenneth Sutherlin Dueker, *Trademark Law Lost in Cyberspace: Trademark Protection for Internet Addresses*, 9 HARV. J.L. & TECH. 483, 492–93 (1996) (explaining the domain name concept).

12. In the example here, "npr" and "netzero" refer to "second-level domains." *See* Dueker, *supra* note 11, at 492–93. Each second-level domain is unique and, hence, commercially valuable. *See* Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 83–86 (Va. 2000); *infra* note 16 (describing the value of domain names). Throughout this Recent Development, "domain names" will refer to the combination of the second-level domain and the top-level domain, called a "fully-qualified domain name." Qualified domain names may additionally include third- and fourth-level domains that refer to subnetworks and specific computers within the registrant's second-level domain. *See* Dueker, *supra* note 11, at 493. For background information on domain-name naming conventions and an explanation of Internet Protocol addresses, see Sally M. Abel, *Trademark Issues in Cyberspace: The Brave New Frontier*, 5 MICH. TELECOMM. TECH. L. REV. 91, 92–93 (1999), http://www.mttlr.org/volfive/abel.pdf (on file with the North Carolina Law Review); Dueker, *supra* note 11, at 492 n.50, 494–95 n.59; Stuart D. Levi et al., *The Domain Name System & Trademarks*, *in* 1 THIRD ANNUAL LAW INSTITUTE, at 449, 453 (PLI Intellectual Prop. Course, Handbook Series No. G-563, 1999).

13. *See* Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227, 1230 (N.D. Ill. 1996); Dueker, *supra* note 11, at 492–93.

14. *See* Dueker, *supra* note 11, at 492–93. When an Internet user enters the recognizable domain name into an Internet browser, the browser sends the request to a computer called a "top-level server" that matches the domain name request to an IP address in its internal registry and routes the user to the host computer. *See id.* at 493.

Until 1999, Network Solutions held an exclusive contract with the federal government to serve as the sole Internet registrar for domain names within the ".com," ".net," and ".org" first-level domains. Thus, Network Solutions is the most popular registrar and is often a litigant in domain name cases. *See, e.g.*, Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 576 (2d Cir. 2000) (holding that Network Solution's regulation of domain names did not violate free speech rights and that Network Solutions was immune from anti-trust liability); Lockheed Martin Corp. v. Network Solutions, Inc.,

registering a domain name (a "registrant") enters into an agreement with an Internet registrar whereby the registrar agrees to ensure that the name is unique, to link the name to the IP address of the registrant's Web site, and to prevent the assignment of an identical name to other registrants for a period of two to ten years.[15]

Widely recognizable domain names describing goods or services offered or coinciding with corporate trademarks have become particularly valuable.[16] For domain names to serve as a source of

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194 F.3d 980, 984 (9th Cir. 1999) (finding that the registrar was not liable for contributory trademark infringement); Nat'l A-1 Adver. v. Network Solutions, Inc., 121 F. Supp 2d 156, 178 (D.N.H. 2000) (rejecting a free speech claim that argued the Internet registrar was a state actor); Island Online, Inc. v. Network Solutions, Inc., 119 F. Supp 2d 289, 304 (E.D.N.Y. 2000) (dismissing an action for refusal to register Internet domain names); *see also* Jonathan Zittrain, *ICANN: Between the Public and the Private: Comments Before Congress*, 14 BERKELEY TECH. L.J. 1071, 1080 (1999) (describing Network Solutions as the "major player in the domain name business"). In October of 1998, other Internet naming services were permitted to assign domain names to Internet Protocol addresses ("IP addresses") within the ".com," ".net," and ".org" first-level domains. *Id.* at 1082. There are now scores of domain name registrars. Internet Corporation for Assigned Names and Numbers (ICANN), *List of Accredited and Accreditation-Qualified Registrars* (listing all current accredited and operational domain name registrars), *at* http://www.icann.org/registrars/accredited-list.html (last visited Feb. 5, 2001) (on file with the North Carolina Law Review); Zittrain, *supra*, at 1082 (noting the existence of almost forty accredited domain name registrars as of November 1999).

15. *See, e.g.*, Network Solutions, Inc., Service Agreement, *at* http://www.networksolutions.com/en_US/legal/service-agreement.html (last visited Feb. 3, 2001) (on file with the North Carolina Law Review) [hereinafter Network Solutions Agreement]; Register.com, Services Agreement, *at* http://www.register.com/service-agreement.cgi? (last visited Feb. 3, 2001) (on file with the North Carolina Law Review) [hereinafter Register.com Agreement]; *see also* Panavision Int'l L.P. v. Toeppen, 945 F. Supp. 1296, 1299 (C.D. Cal. 1996) (describing domain name registration process), *aff'd*, 141 F.3d 1316 (9th Cir. 1998); *Umbro*, 529 S.E.2d at 84 (same); Abel, *supra* note 12, at 93 (noting some of the available terms in registration agreements).

16. Dorer v. Arel, 60 F. Supp 2d 558, 561 (E.D. Va. 1999) ("[T]here is a lucrative market for certain generic or clever domain names that do not violate a trademark."). The generic domain names "business.com" and "loans.com" recently sold for $7.5 million and $3 million respectively. Leslie Walker, *The Name of the Game Is Names*, WASH. POST, June 22, 2000, at E01 (describing the high value of the generic domain name market). The Web site "GreatDomains.com" has nearly one million domain names listed on its Web site. *Id.*; *see also* Grover, *supra* note 6, at 12 (noting that the auctioning of generic names, such as "business" and "sports," in the expanding first-level domain ".tv" starts at $1 million).

The recent line of famed "cybersquatter" cases exemplifies the value of domain name rights. *See, e.g.*, Toys "R" Us, Inc. v. Abir, 45 U.S.P.Q.2d 1944, 1948–49 (S.D.N.Y. 1997); Intermatic, Inc. v. Toeppen, 947 F. Supp. 1227, 1233–34 (N.D. Ill. 1996); *Panavision*, 945 F. Supp. at 1296. *See generally* J. THOMAS MCCARTHY, 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 25:77 (4th ed. 2001) (providing an overview of "cybersquatting" cases). A "cybersquatter" is a person that has registered a domain name identical to an established corporate trademark with the intention of selling the domain name rights to the trademark holder for a large sum of money. 4 MCCARTHY, *supra*, § 25:77, at 25-221. For an update on the current cybersquatter debate, see *ICANN*

collateral for secured financing, Revised Article 9 of the Uniform Commercial Code must permit the creation of enforceable security interests in these rights.[17] Although Revised Article 9 defines a variety of property interests that may be used as collateral, it does not specifically include domain name rights.[18] Case law descriptions of domain name rights will thus determine both the ability of these rights to serve as collateral and their collateral categorization under Revised Article 9.

Courts have held that trademarks fall within the "general intangibles" category under the current Article 9.[19] Federal courts have further held that domain name rights constitute trademarks when identifies and distinguishes the source of goods or services available through a Web site.[20] It follows that those domain name rights delineated as trademarks may serve as general intangible collateral within the scope of Article 9.[21]

Call it What I Want, ECONOMIST, Sept. 9, 2000, at 74, 79.

17. Rev. U.C.C. § 9-101 (2000). Like the current Article 9, Revised Article 9 permits the creation of security interests in personal property and fixtures to secure the payment or other performance of an obligation. *Id.* § 9-101, cmt. 1 (pointing out that "[f]or the most part this [revised] Article follows the general approach and retains much of the terminology of former Article 9"); *Id.* § 9-109(a)(1); § 9-102(1)(a). Such a security interest is created and is enforceable against the debtor and third party claims when the security interest attaches to collateral within the scope of Revised Article 9 and is perfected. *Id.* § 9-203 (indicating when a security interest becomes attached and enforceable); *Id.* § 9-109 (delineating the scope of Revised Article 9); *Id.* §§ 9-301 to 9-306 (describing perfection requirements for various forms of collateral). For an extended description of changes in attachment and perfection requirements under Revised Article 9, see generally PRACTISING LAW INSTITUTE, WHAT LAWYERS NEED TO KNOW ABOUT THE NEW UCC ARTICLE 9-SECURED TRANSACTIONS (Sandra Stern ed. 2000).

18. *See* Rev. U.C.C. § 9-109 (listing various categories of collateral within the scope of Revised Article 9).

19. *See* Joseph v. 1200 Valencia, Inc., 137 B.R. 778, 781 (Bankr. C.D. Cal. 1992) (holding that trademarks fall within the category of general intangibles); *In re* Roman Cleanser Co., 43 B.R. 940, 943 (Bankr. E.D. Mich. 1984) (enforcing a security interest in a trademark as a general intangible). *See generally* BARKLEY CLARK, 1 THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE § 1.08(1)(g) (rev. ed. 2000) (discussing the use of trademarks as collateral).

20. *E.g.*, Lockheed Martin Corp. v. Network Solutions, Inc., 985 F. Supp. 949, 956 (C.D. Cal. 1997) (distinguishing the technical use of domain names from the use of trademarks to identify goods or services), *aff'd*, Lockheed Martin Corp. v. Network Solutions, Inc., 194 F.3d 980 (9th Cir. 1999); 1 MCCARTHY, *supra* note 16, § 7:17.1 (explaining when a domain name is also a trademark); *see also* Data Concepts, Inc. v. Digital Consulting, Inc., 150 F.3d 620, 627 (6th Cir. 1998) (Merritt, J., concurring) ("When a domain name is used only to indicate an address on the Internet and not to identify the source of specific goods and services, the name is not functioning as a trademark.").

21. *See* Philip A. Haber, *Security Interests in Internet Domain Names*, METROPOLITAN CORPORATE COUNSEL, May 2000, http://www.kelleydrye.com/a-71000b.htm (on file with the North Carolina Law Review) (concluding that domain name rights, when considered trademarks, would be general intangibles under Revised Article

As a practical matter, only a small percentage of domain names are also trademarks and thus within the scope of Article 9.[22] Whether rights to generic and common domain names may be used as collateral under Revised Article 9 remains to be determined. These generic domain names—such as chapelhill.com, smith.com, and sports.com—are among the most commercially valuable domain names and would best serve as collateral.[23]

State and federal courts have suggested two alternative characterizations of generic domain name rights. Some courts have analogized them to rights under a contract for services, such as those held by subscribers to a telephone service.[24] In *Network Solutions Inc. v. Umbro International, Inc.*,[25] for example, the Virginia Supreme Court extended the reasoning of two prior cases that described domain names as a product of a contract for services.[26] Specifically, the *Umbro* court defined domain name rights as a contract for personal services that is "inextricably bound to the domain name services that [the registrar] provides."[27] As contracts for personal services, the court held that the domain name rights were neither

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22. 1 MCCARTHY, *supra* note 16, § 7:17.1, at 7-25 ("Out of the thousands, perhaps millions, of domain names, probably only a small percentage also play the role of a trademark or service mark."). Even if a domain name is confusingly similar to a trademark, it is not a trademark if used for its non-trademark value. *See* Avery Dennison Corp. v. Sumpton, 189 F.3d 868, 880 (9th Cir. 1999).

23. As described above, because generic domain names may be used in a variety of business contexts without the risk of trademark infringement, generic names are very valuable. *See supra* note 16 (citing examples of generic domain names that have been sold for millions of dollars). The bars of descriptiveness under section 2(e) of the Lanham Act will prohibit many domain names from becoming registered trademarks. 15 U.S.C. § 1052(e) (1994). For a discussion of domain names that could not be registered as trademarks, see 1 MCCARTHY, *supra* note 16, § 7:17.1.

24. *See* Dorer v. Arel, 60 F. Supp 2d 558, 561 (E.D. Va. 1999) (analogizing domain name rights to the rights of subscribers to telephone service); Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 86–87 (Va. 2000) (same); *see, e.g.*, *Lockheed Martin*, 985 F. Supp. at 952 (comparing domain name registrations to the rights of those held by owners of toll free vanity telephone numbers); *see also* MTV Networks v. Curry, 867 F. Supp. 202, 203–04 n.2 (S.D.N.Y. 1994) (comparing domain names to telephone number mnemonics); *see generally* Adam Chase, *A Primer on Recent Domain Name Disputes*, 3 VA. J.L. & TECH. 3 (1998), *at* http://vjolt.student.virginia.edu/graphics/vol3/home_art3.html (same).

25. 529 S.E.2d at 80.

26. *Id.* at 86 (building upon the *Dorer* court's definition of domain name rights as a contract for services); *see also Dorer*, 60 F. Supp. 2d at 561 (stating that domain name rights are like those under a service contact); *Lockheed Martin*, 194 F.3d at 985 (characterizing the role of an Internet registrar as providing a service).

27. *Umbro*, 529 S.E.2d at 86.

assignable nor garnishable.[28] At least one federal district court, on the other hand, has rejected the reasoning of *Umbro* and suggested that domain name rights are intangible property rights.[29] Under this second characterization, registrants have a possessory interest in, and may freely transfer, their domain name rights.[30]

Regardless of whether domain name rights are characterized as a contract for services or as intangible personal property, security interests in these rights appear to fall within the scope of Revised Article 9 collateral category of "general intangibles."[31] As the courts point out, the definition of domain name rights as personal service contracts is analogous to the rights held by telephone number subscribers.[32] Security interests in rights held by telephone subscribers have long been enforced by the courts as general intangibles under the current Article 9.[33] It follows that domain name rights equated to the rights of a personal service contract would fall within the same category under Revised Article 9.[34] If characterized as intangible property rights, domain name rights still would seem to qualify as "general intangibles," a category designed by the drafters of Article 9 as a catch-all for various contract and intangible rights not elsewhere defined in the Article.[35] When categorized as intangible

28. *Id.* at 86–88. Umbro had sought to garnish domain names from Network Solutions held by Canada, Inc. and sell them at auction to satisfy a default judgment for trademark infringement. *Id.* at 81.

29. Kremen v. Cohen, 99 F. Supp 2d 1168, 1173 n.2 (N.D. Cal. 2000). The *Kremen* court adopted the *Umbro* dissent's reasoning that the "right to use domain names 'exists separate and apart from NSI's various services.' " *Id.* (quoting *Umbro*, 529 S.E.2d at 89 (Compton, S.J., dissenting)). The court recognized domain name rights as intangible property rights, although not the variety that would sustain an action for conversion. *Id.* at 1174.

30. The *Umbro* dissent best articulates this position. *Id.* at 88–89 (Compton, S.J., dissenting) (stating that "the right to use a domain name is a form of intangible personal property" and that a registrant "has a current possessory interest in the use of the domain names").

31. Rev. U.C.C. § 9-102(42) (2000) (defining "general intangible").

32. *See supra* note 24 and accompanying text.

33. *See, e.g., In re* Remes Glass, Inc., 136 B.R. 132, 138 (Bankr. W.D. Mich. 1992) (holding that a perfected security interest in general intangibles included telephone service rights); *In re* Salisbury Flower Mkts., Inc., No. 4-89-3142, 1991 WL 26597, at *2 (Bankr. D. Minn. 1991) (including telephone numbers as general intangibles); *In re* Mid-West Motors, Inc., 82 B.R. 439, 440 (Bankr. N.D. Tex. 1988) (including rights to a telephone number in assets pursuant to a lien on general intangibles).

34. Haber, *supra* note 21.

35. The official comment to Revised Article 9 indicates that the collateral category "general intangibles" is intended to include all types of personal property not included in other categories. Rev. U.C.C. § 9-102 cmt. 5(d) (2000). The official comments to previous versions of Article 9 also indicated the intent that general intangibles serve as a catch-all category. *See, e.g.*, U.C.C. § 9-106 cmt. (1995); *see also* CLARK, *supra* note 19, § 1.03(2), at

property rights, domain name rights are the sort of personal property rights that the drafters intended the general intangibles category to include.[36] Thus, under either characterization, domain name rights are arguably within the scope of Revised Article 9, and security interests may be created and enforced by the Revised Article 9 provisions applicable to this category.

However, restrictions on the debtor's ability to assign domain name rights pose potential barriers to the use of these rights as general intangible collateral.[37] Assignment restrictions are imposed on domain name rights in two ways. First, many domain name registration agreements—such as those of Network Solutions Inc. and Register.com, the two most popular registrars—include terms prohibiting assignment of domain name rights without consent of the domain name registrar.[38] Second, *Umbro*'s definition of domain name rights as a contract for personal services imposes a common law restriction on assignment, unless the contract allows assignment, the other party consents to the assignment, or the assignment would not alter the nature of the performance or obligation.[39]

The drafters of Revised Article 9, however, anticipated the problems created by assignment restrictions. Because the changing business environment had turned many general intangibles—particularly software licenses—into valuable business assets, the drafters sought to make these general intangibles available as

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1–16 ("The term 'general intangibles' is residual in nature; it picks up all personal property that does not fall within one of the other Article 9 categories.").

36. CLARK, *supra* note 19, § 1.03(2), at 1–16.

37. Revised U.C.C. § 9-408 follows analogous provisions in previous versions of Article 9 that permitted security interests in certain forms of collateral despite restrictions on assignment of the collateral. *See* CLARK, *supra* note 19, § 1.04(4)(e), at 1–44 (stating that an anti-assignment provision is voided by former U.C.C. § 9-318(4); *compare* Rev. U.C.C. § 9-408 (voiding restrictions on the assignment of promissory notes, health-care-insurance receivables, and certain general intangibles), *with* U.C.C. § 9-318(4) (voiding anti-assignment provisions in annuity contracts).

38. *See* Network Solutions Agreement, *supra* note 15; Register.com Agreement, *supra* note 15.

39. Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 86 (Va. 2000) (citing J. Maury Dove Co., Inc. v. New River Coal Co., 143 S.E. 317, 327 (Va. 1928)); McGuire v. Brown, 76 S.E. 295, 297 (1912); *see also* 4 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 865 (1951 & Supp. 2000) (explaining limits on the assignment of personal services contracts); 3 S. WILLISTON, CONTRACTS, § 412, at 30–33 (W. Jaeger ed., 3d ed. 1960) (same). Although personal service contracts may be assigned if assignment would not change the character of the performance and the obligation, *see, e.g.*, Munchak Corp. v. Cunningham, 457 F.2d 721, 725 (4th Cir. 1972); Schultz v. Ingram, 248 S.E.2d 345, 350 (N.C. App. 1978), the *Umbro* court foreclosed this exception, stating that this "contractual right is inextricably bound to the domain name services that [the registrar] provides." *Umbro*, 529 S.E.2d at 86.

collateral.[40] Although many general intangibles include express restrictions on assignment that would otherwise bar the creation of a security interest, subsections (a) and (c) of Revised 9-408 make such restrictions "ineffective ... to prevent the creation, attachment, or perfection of the security interest."[41]

Because domain name rights appear to fall within the category of general intangibles, Revised 9-408 applies to security interests in domain name rights as well, permitting these rights to serve as collateral despite restrictions on assignment.[42] Consequently, Revised 9-408(a) should nullify the express restrictions on assignment contained in registration agreements,[43] which are analogous to the restrictions in software licenses that the drafters sought to eradicate.

Revised 9-408(c) similarly neutralizes the common law restriction on the assignment of rights under a personal service contract imposed under *Umbro*.[44] This subsection permits the creation of a security interest whether the assignment of collateral is restricted by a statute, the terms of an agreement, or a *rule of law*.[45] A majority of jurisdictions have held that an analogous provision in the current Article 9[46] removes case law restrictions that bar the creation of a security interest.[47] Revised 9-408(c), therefore, should remove case law restrictions on domain name rights as well.

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40. Rev. U.C.C. § 9-408 cmt. 2 (2000) (providing an example characterizing a software license as a general intangible); *id.* § 9-408 cmt. 8 (stating that "this section should enable debtors to obtain additional credit").

41. *Id.* § 9-408(a), (c)(1); *see also id.* § 9-408 cmt. 2 (explaining that Revised 9-408 allows for the "creation, attachment, and perfection of a security interest in a general intangible"). The current version of Article 9 contains similar provisions nullifying restrictions on assignment of other categories of collateral. *Id.* § 9-318. Revised Article 9 expands this nullification to promissory notes, health care receivables, and general intangibles. *Id.* § 9-408.

42. *Id.* § 9-408(a) (including general intangibles within the scope of Revised 9-408).

43. *Id.* (making ineffective a term which prohibits, restricts, or requires consent for assignment to the extent that the term "would impair the creation, attachment, or perfection of a security interest").

44. *Id.* § 9-408(c) (making ineffective a rule of law that prohibits, restricts, or requires consent for assignment to the extent that the rule of law "would impair the creation, attachment, or perfection of a security interest").

45. *Id.*

46. *Id.* § 9-318 (removing restrictions on the assignability of accounts and contract rights in other collateral categories).

47. *See* Doyle v. Northrop Corp., 455 F. Supp. 1318, 1330–31 (D.N.J. 1978); Miss. Bank v. Nickles & Wells Constr. Co., 421 So. 2d 1056, 1059 (Miss. 1982); *see also* CLARK, *supra* note 19, § 11.02, at 11-3 to 11-4 (indicating that courts generally have held that the current § 9-318 guarantees freedom of assignment). *But see* Mingledorff's, Inc. v. Hicks, 209 S.E.2d 661, 662 (Ga. Ct. App. 1974) (rejecting current Article 9's removal of contractual assignment restrictions when the contract is for services and labor rather than for the sale of goods).

Although Revised 9-408 permits the creation of enforceable security interests, the drafters also sought to preserve the rights of the grantors of general intangibles and, in doing so, somewhat limited the rights of secured parties.[48] Under Revised 9-408(d)(4) and (6), a secured party may not "use or assign the debtor's rights under the . . . general intangible" or "enforce the security interest in the . . . general intangible."[49] Thus, although a lender may obtain a valid and enforceable security interest, that lender may not effect a sale or otherwise seek to enforce its security interest against the debtor without the debtor's consent.[50] Applied to domain name collateral, it follows that a secured party could not obtain domain name rights upon the domain name registrant's default without the consent of the domain name registrar.[51] A secured party's options in default are thus limited.

These limitations, however, do not render security interests in domain name rights impractical. First, as the official comment explains, Revised 9-408 preserves the security interest for the benefit of the secured party in bankruptcy.[52] When a debtor enters bankruptcy, if the domain name registrar refuses to consent to the transfer of the domain name rights, the secured party would be entitled to the proceeds of the sale of the rights.[53] Second, secured parties may take actions to minimize the effect of the Revised 9-408(d) limitations. In jurisdictions where domain name rights are characterized as intangible property rights, the limitations of Revised

48. Rev. U.C.C § 9-408(d) (2000); § 9-408 cmt. 2 ("On the other hand, subsection (d) protects the [grantor of a general intangible]. . . ."); *Id.* § 9-408 cmt. 6 (2000) ("[S]ubsection (d) ensures that [grantors of general intangibles] are not affected adversely.") (emphasis omitted). In the case of domain names, this subsection would protect the rights of the registrar. *See id.*

49. *Id.* § 9-408(d)(4), (6).

50. *Id.*; *see also id.* § 9-408 cmt. 2 (noting that under subsection (d), a secured party would be entitled to enforce the security interest or assign rights in collateral); *see* Haber, *supra* note 21.

51. An explanation of a secured party's rights in default is beyond the scope of this Recent Development. For a definition of the secured party's rights upon the debtor's default, see Rev. U.C.C. §§ 9-601 to 9-624. It is sufficient to note that when invoked, Revised 9-408(d) prevents a secured party from enforcing a security interest or assigning rights in the collateral.

52. *Id.* § 9-408 cmt. 7 ("Bankruptcy Code Section 552 invalidates security interests in property acquired after a bankruptcy petition is filed, except to the extent that the postpetition property constitutes proceeds of prepetition collateral."). Example 4 to Comment 7 demonstrates that under this section, a security interest for the benefit of the secured party would attach to the proceeds of the sale of a franchise (a general intangible) in bankruptcy. *Id.* § 9-408 cmt. 7, ex. 4. Without this section, the security interest would be eliminated and the secured party would only receive a fraction of such proceeds. *Id.*

53. *See Id.* § 9-408 cmt. 7, ex. 4.

9-408 are only invoked by the express limitations of a registration agreement.[54] Therefore, secured parties may insist that domain name registration agreements permit the assignment of domain name rights. Because many domain name registrars already offer agreements absent such restrictions, this should be easily accomplished.[55] Under *Umbro*, when a jurisdiction imposes common law restrictions on assignment, secured parties could seek advance consent from a domain name registrar for the assignment of rights in default to ensure its rights in default are maximized.[56]

Thus, the setbacks imposed when Revised 9-408(d) is invoked are avoidable, and the provision preserves the ability of debtors to utilize domain names as collateral. Despite some limitations, Revised Article 9 appears to successfully addresses the needs of businesses in this evolving economic environment by permitting them to use valuable domain names as collateral. Not only is this result good news for Internet-related business in urgent need of additional credit, but the versatility and foresight demonstrated by Revised Article 9 in dealing with this previously unforeseen source of collateral bodes well for its ability to allow businesses to take advantage of the value of future unrealized intangible business assets.

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54. *Id.* § 9-408(a), (d)(4), (d)(6); Kremen v. Cohen. 99 F. Supp. 2d 1168, 1173 n.2 (N.D. Cal. 2000); *see supra* notes 35–36 and accompanying text (describing the characterization of domain name rights as intangible property rights).

55. *See* Network Solutions Agreement, *supra* note 15; Register.com Agreement, *supra* note 15.

56. Network Solutions, Inc. v. Umbro Int'l, Inc., 529 S.E.2d 80, 81 (Va. 2000) (characterizing domain name rights as rights under a personal services contract that are restricted in assignability).